

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION,

Plaintiff,

v.

UNITED STATES CUSTOMS AND
BORDER PROTECTION and UNITED
STATES IMMIGRATION AND CUSTOMS
ENFORCEMENT,

Defendants.

No. 1:19-cv-11311 (JSR)

SUPPLEMENTAL DECLARATION OF NATHAN FREED WESSLER

I, Nathan Freed Wessler, in accordance with 28 U.S.C. §1746 declare as follows:

1. I am an attorney at the American Civil Liberties Union Foundation and co-counsel for Plaintiff American Civil Liberties Union (“ACLU”) in the above-numbered action.

2. I submit this declaration in further support of Plaintiff’s Motion for Summary Judgment and opposition to Defendants’ Cross-Motion for Summary Judgment. This declaration and the accompanying exhibits supplement my previous declaration and exhibits filed on June 26, 2020. *See* ECF No. 32.

3. Defendant Immigration and Customs Enforcement (“ICE”) justifies its withholding of certain information in this case through declarations of a Department of Homeland Security (“DHS”) official, who asserts that the redacted portion of the relevant document “contains information about the capabilities of the cell site technology utilized by DHS components and information about the circumstances under which DHS components utilize cell site simulators.” Suppl. Decl. of James Holzer ¶ 5, ECF No. 34; *see also* Decl. of James Holzer ¶ 7, ECF No. 29.

4. The following exhibits, attached hereto as Exhibits T to BB and filed on July 10, 2020, provide additional evidence that such information is already publicly known. These exhibits represent true and correct copies, or true and correct copies of excerpts, of such documents.

5. Exhibit T is a warrant go-by (*i.e.*, template) provided by the Computer Crime and Intellectual Property Section (“CCIPS”), Criminal Division, U.S. Department of Justice, dated September 2015. It is titled “Warrant for the Use of a Cell-Site Simulator to Obtain Identifiers of a Cell Phone or Other Cellular Device at Particular Locations (‘Canvassing’).” It was produced in this litigation at Bates pages 496–506 of ICE’s March 4, 2020 production. This document addresses the capabilities of cell site simulator technology and circumstances under which it may be used.

6. Exhibit U is a warrant go-by provided by CCIPS, dated September 2015. It is titled “Warrant for the Use of a Cell-Site Simulator to Identify the Location of a Known Cell Phone or Other Cellular Device.” It was produced in this litigation at Bates pages 507–517 of ICE’s March 4, 2020 production. This document addresses the capabilities of cell site simulator technology and circumstances under which it may be used.

7. Exhibit V is a 2017 warrant application submitted by a Deportation Officer with ICE Enforcement and Removal Operations for use of a cell site simulator to locate an individual suspected of having “violated 8 U.S.C. § 1326(a), Unlawful Re-entry after Deportation.” *See Ex. V ¶¶ 2, 5.* This warrant application is publicly docketed by the U.S. District Court for the Eastern District of Michigan and is publicly available on PACER. Application for a Search Warrant, *In re Search of the Cellular Device Assigned Call Number (586) 522-6746, No. 2:17-MC-50368-DML* (E.D. Mich. Mar. 9, 2017) (ECF No. 1). This warrant application is the subject of the May

19, 2017, Detroit News article filed in this action as Exhibit C to the Declaration of Alexia Ramirez (“Ramirez Declaration”), ECF No. 23-3.

8. Exhibit W is a 2019 warrant application submitted by an ICE Deportation Officer for use of a cell site simulator to locate an individual suspected of having “illegally reentered the United States after having been removed subsequent to a conviction for a felony, in violation of 8 U.S.C. §§ 1326(a) and (b)(1).” *See Ex. W ¶¶ 2, 5.* This warrant application is publicly docketed by the U.S. District Court for the Eastern District of New York, and is publicly available on PACER. Aff. in Support of an Application for a Search Warrant, *In re Use of a Cell-Site Simulator to Locate the Cellular Device Assigned Call Number 201-283-7734, with International Mobile Subscriber Identity Number 354255097677993*, No. 1:19-MC-1314-ST (E.D.N.Y. May 16, 2019) (ECF No. 1). This warrant application is the subject of the October 17, 2019, Univision article filed in this action as Exhibit K to the Ramirez Declaration, ECF No. 23-11.

9. Exhibit X is a 2015 warrant application submitted by a Task Force Agent with DHS Homeland Security Investigations (“HSI”), a component of ICE, for use of a cell site simulator to locate an individual suspected of having violated 21 U.S.C. §§ 841(a)(1) and 846, having been indicted for “possession with intent to distribute more than a kilogram of heroin.” *Ex. X ¶¶ 2, 5, 27.* Section 841(a)(1) makes it unlawful for a person “to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.” 21 U.S.C. § 841(a)(1). This warrant application is publicly docketed by the U.S. District Court for District of Vermont, and is publicly available on PACER. Aff. in Support of an Application for a Search Warrant, *In re Use of a Cell-Site Simulator to Locate the Cellular Device Assigned Call Number (802) 430-1620, with International Mobile Subscriber Identity / Electronic Serial Number 310410848941677*, Nos. 2:15-CR-152-WKS & 2:15-MJ-151 (D. Vt.

Nov. 9, 2015) (ECF Nos. 6-1, 6-2, 6-3).

10. Exhibit Y is a 2015 application for a warrant and order to permit HSI to use a cell site simulator to locate an individual suspected of “conspiracy to distribute narcotics, in violation of Title 21, United States Code, Sections 846 and 841(a) . . . and money laundering, in violation of Title 18, United States Code, Sections 1956 and 1957.” Ex. Y, Application ¶¶ 3, 30–33; Ex. Y, Affidavit ¶¶ 3, 6, 20–24. This application is publicly docketed by the U.S. District Court for Northern District Illinois, and is publicly available on PACER. Application for a Warrant & Order, *In re Application of the U.S. for an Order Relating to Telephone Number (312) 399-9606 (“Subject Phone 14”) and Telephone Number (708) 261-2832 (“Subject Phone 15”)*, No. 14-GJ-1008 (N.D. Ill. July 24, 2015) (publicly docketed under *United States v. Sanchez-Jara*, No. 1:15-CR-00457 (N.D. Ill. June 11, 2018) (ECF No. 137-1)).

11. Exhibit Z is a 2018 application for a search warrant submitted by an HSI Special Agent to investigate:

violations of 21 U.S.C. § 841(a)(1) (possession with the intent to distribute, and to distribute, cocaine, a Schedule II controlled substance); 21 U.S.C. § 843(b) (use of a communication facility in furtherance of a controlled substance felony); 21 U.S.C. § 844(a) (simple unlawful possession of cocaine); and 21 U.S.C. § 846 (conspiracy to possess with the intent to distribute, and to distribute, cocaine, a Schedule II controlled substance).

Ex. Z ¶¶ 1, 5. While the warrant application seeks authority to search the contents of two cell phones, the probable cause statement recites that “[t]hrough the course of the investigation, HSI has employed a number of investigative techniques to identify, obtain, and monitor the devices and communications of and between [the suspects], including, but not limited to . . . cell-site simulators.” *Id.* ¶ 11. This application is publicly docketed by the U.S. District Court for the Western District of New York, and is publicly available on PACER. Application for a Search Warrant, *In re Search of Silver LG/Metro PCS Cell Phone with No Identifiable Number in a*

Black Protective Case, No. 1:18-MJ-00168-HKS (W.D.N.Y. Nov. 1, 2018) (ECF No. 1).

12. Exhibits T through Z demonstrate publicly known information about the circumstances under which DHS components use cell site simulators, including the examples of the variety of criminal offenses for which cell site simulators may be used to investigate or apprehend suspects, as well as information about the capability of cell site simulator technology used by DHS components.

13. Exhibit AA is an unredacted version of the first page of the letter from DHS to Senator Wyden (designated as Bates page 1168). The redacted version of this page originally produced to Plaintiff is contained in Exhibit R to the Ramirez Declaration (ECF No. 23-18). The newly unredacted version attached here was produced by ICE on July 9, 2020.

14. Exhibit BB is an unredacted version of the first page of the communication from DHS to Senator Franken (designated as Bates page 1171). The redacted version of this page originally produced to Plaintiff is contained in Exhibit S to the Ramirez Declaration (ECF No. 23-19). The newly unredacted version attached here was produced by ICE on July 9, 2020.

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 10, 2020.



Nathan Freed Wessler

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of July, 2020, I electronically filed the foregoing Supplemental Declaration of Nathan Freed Wessler and the accompanying exhibits using the Court's CM/ECF system, which effects service upon counsel for Defendants.

/s/ Nathan Freed Wessler

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